

Maryland Governor's Commission on Capital Punishment
Testimony of Brian Forst¹
September 5, 2008

I wish to begin by thanking the Commission for asking for my observations on the death penalty.

The most successful public policies are not only informed by public opinion, but supported by rigorous scientific analysis. Governments can err seriously when policy is driven by public perceptions that do not stand up to scientific scrutiny -- a phenomenon that has been especially common in setting criminal justice policy (three-strikes laws, DARE and "scared straight" programs are three such examples). So it is reassuring to participate in a forum that invites the questioning of popular assumptions that form the basis for public policy. As for questions about the efficacy of the death penalty, the stakes are especially high.

Capital punishment can be both defended and attacked based on valid *moral* considerations, such as whether any sanction more lenient than lethal injection can be regarded as just for the most reprehensible offenders, such as Timothy McVeigh; whether the death penalty is consistent with a humane, civil society; whether it can be administered in a sufficiently fair and consistent manner; and whether the prospect of wrongful executions and the irreversibility of such errors makes it an acceptable sanction.

It can also be defended and attacked based on valid *factual* considerations, such as its standing as the ultimate instrument of incapacitation and whether it is actually administered in an error-free manner.

Perhaps the most critical question of fact about the death penalty asks whether it is an effective deterrent of homicides and other serious crimes. On this question there has been an outpouring of research since the 1960s, when criminologist Thorsten Sellin used the logic of the natural experiment in comparing the homicide rates of abolition states with those of neighboring states that used the death penalty; he found no systematic differences.

The research then and now has relied on data of two types: longitudinal (over time) and cross-sectional (across jurisdictions). One of the most widely cited and controversial researchers on the death penalty, economist Isaac Ehrlich, used both approaches in the 1970s and concluded that the death penalty deters the crime of homicide. His research was controversial for several reasons: it was the first to find a deterrent effect of capital punishment; it was published in two premier journals of economics; and it was introduced as evidence by the U.S. Solicitor General in briefs supporting the death penalty in two 1976 Supreme Court cases: *Fowler v. North Carolina* and *Gregg v. Georgia*.

Several prominent economists, including Nobel laureate Lawrence Klein, reanalyzed Ehrlich's data and concluded that his findings were not robust -- they held up only under a particular set of assumptions and collapsed under models using a variety of alternative, equally plausible assumptions about how factors relate to one another and about other factors that should be accounted for, such as the severity of alternative sanctions for serious crimes and the availability of guns. Ehrlich's time series results for 1933-69 were found also to be driven heavily by the fact that the death penalty was ended in the 1960s,² while the homicide rate increased substantially in the same decade. His analysis of the cross section of states produced a deterrence finding only for the years 1940 and 1950, and as with his time-series analysis, it held up only under a fairly restrictive set of model specifications and was contradicted by the research of other prominent scholars using equally, if not more, plausible modeling assumptions.

The question then came down to whether the correspondence of the ending of the death penalty in the 1960s and the increase in homicides was causal or coincidental, associated exclusively with factors other than the ending of capital punishment, factors such as the sharp increase in the population of 18-24 year-olds and the turmoil of the 1960s.

To address this question, I conducted a cross-state analysis that focused on this critical decade, 1960 to 1970, to see whether the states that lost the presumed deterrent benefit of the death penalty during this period experienced a larger increase in homicide rates than the states that did not use or allow capital punishment in 1960. The central idea was to test the deterrence theory using a design that exploited the natural experiment of the 1960s, focusing on changes in the key variables over the decade for the panel of 50 states. I found that states that experienced larger declines in the *conviction* rate tended to have larger increases in the homicide rate during the decade, but that no systematic deterrent effect revealed itself for the death penalty. In fact, the states that stopped using the death penalty tended to have *smaller* increases in the homicide rate than the other states. Under the deterrence theory, the homicide rates in the states that lost the presumed deterrent benefit should have increased at greater rates than in the other states.

I concluded that while some people may in fact be deterred by the death penalty, at least as many people appear to be provoked to commit murder when they face the risk of execution.

What could possibly explain such a finding? Several forces might be at work simultaneously: 1. The death penalty might create incentives for murderers to kill police officers, witnesses and others who could bring about their arrest and conviction. 2. Judges and juries might be more inclined to acquit murderers when a guilty verdict could result in the execution of a defendant. 3. Capital punishment provides an opportunity to commit suicide in a perversely exciting way. 4. The death penalty may have a brutalizing effect on the public, signaling to them that killing is acceptable under certain circumstances. These explanations are not likely to apply equally to all offenders, but if enough offenders are motivated by one or more of these factors, the net effect of the death penalty might well be in the opposite direction of deterrence.

It would appear, then that the people who do the actual murdering do not reason in the manner that those who set policies about the death penalty think they do.

There is, in short, no convincing evidence that the death penalty deters homicides. This had become clear by the mid-1980s, and it has been confirmed and re-confirmed in subsequent analyses, including one by Jeffrey Fagan, whose testimony will follow mine, and no one is better qualified to discuss his findings than he.

Another prominent analysis, conducted by John Donohue and Justin Wolfers and published in the *Stanford Law Review* in 2006, deserves comment because of its thoroughness and rigor, like Professor Fagan's research, and because it drew such remarkably similar conclusions as the work I did 30 years ago. Analyzing a panel of 45 death penalty abolition states and 41 with reinstatements during 1960 through 2000, and reanalyzing data from other researchers, Donohue and Wolfers concluded that while many studies purport to find a deterrent effect of the death penalty,³ "our reanalysis shows that small changes in specifications, samples, or functional form can dramatically change the results. Indeed, several of the more expansive specifications point to an antideterrent effect of the death penalty." (p. 836)

To conclude, the death penalty can be supported on several grounds, but the accumulated scientific evidence indicates clearly that the deterrence of homicides is not one of them.

Notes

1. Brian Forst is Professor of Justice, Law and Society at the American University School of Public Affairs, in Washington, DC. He wishes to thank Tom Brady, Jeffrey Fagan, Deirdre Golash, Kelley Moulton, Alex Piquero, Renee Souris, and Justin Wolfers for their helpful comments on drafts of this statement.
2. Challenges to the constitutional validity of the death penalty led to a 10-year moratorium in its use starting in 1967.
3. One must ask why such studies get published in the first place, if the findings are so fragile. Donohue and Wolfers conclude that they are published because of a bias toward the submission and publication of studies that report findings of statistical significance. (pp. 837-41)

Bibliography

John J. Donohue and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Review*, vol. 58 (2006), pp. 791-845

Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *The American Economic Review*, vol. 65, no. 3 (June 1975), pp. 397-417

-----, "Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence," *The Journal of Political Economy*, vol. 85 (1977), no. 4

Brian Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s," *Minnesota Law Review*, vol. 61 (May 1977)

-----, "Capital Punishment and Deterrence: Conflicting Evidence?" *Journal of Criminal Law & Criminology*, vol. 74 (Fall 1983)

-----, *Errors of Justice: Nature, Sources and Remedies* (New York: Cambridge University Press, 2004)

Lawrence Klein, Brian Forst, and Victor Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Estimates," in *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, edited by Alfred Blumstein et al., (Washington, DC: National Academy of Sciences, 1978)

Thorsten Sellin, "Homicides in Retentionist and Abolitionist States," in *Capital Punishment* (New York: Harper & Row, 1967)

Hans Zeisel, "The Deterrent Effect of the Death Penalty: Facts v. Faiths," *The Supreme Court Review*, vol. 1976 (1976), pp. 317-343